IN THE

Supreme Court of the United States

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

v.

JEAN-MARIE MAUCLET,

Appellee,

and

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al.,

Appellants,

v.

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

BRIEF FOR APPELLEE RABINOVITCH

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Introductory Statement

New York State provides three categories of financial assistance to students of colleges, universities and certain vocational schools, namely:

A. Academic performance awards, consisting primarily of Regents College Scholarships awarded to students on

the basis of their performance in a competitive qualifying examination. New York Education Law §§ 605, 670 *et seq.* (McKinney Supp. 1976) (hereinafter referred to as "NYEL").

B. General awards, consisting primarily of tuition assistance program awards which "are available for all students who are enrolled in courses of college or hospital based study and training . . . who demonstrate the ability to complete such courses, in accordance with standards established by the commissioner [of education]." NYEL §§ 604, 667 *et seq.*

C. Student loans to persons attending colleges or vocational institutions to assist them in meeting their expenses. NYEL §§ 680 *et seq.*

The basic qualifications for participation in each of the foregoing programs are contained in NYEL § 661. At issue in this case is the statutory provision, NYEL § 661(3), which excludes from participation in all three financial aid programs all aliens (except "paroled" refugees) who, even though lawfully admitted to permanent residence in the United States and satisfying New York's durational residency requirement (NYEL § 661(5)), are unwilling to become United States citizens and actually acquire citizenship as soon as qualified.

In these two cases[1] on appeal from a single three-judge district court for both the Western and Eastern Districts of New York, appellants seek reversal of the unanimous

[1] The *Rabinovitch* and *Mauclet* cases were independently commenced, some seven months apart (A 1, 3), in two separate district courts. Because the issues tendered were similar, the Chief Judge of the Second Circuit designated the same three judges to hear both cases. (A 1, 4.) Although the two cases were heard together in Brooklyn, New York on July 22, 1975 (A 16), and were disposed of by a single opinion, they were never in fact ordered consolidated for all purposes under Fed. R. Civ. P. 42.

decision below holding NYEL § 661(3) unconstitutional and enjoining its enforcement. Finding that the statute employed a suspect classification, alienage, the district court applied the "strict scrutiny" test in evaluating the statute's constitutionality; it concluded that appellants had failed to meet their burden under that test (and could not even satisfy the less demanding "rational relationship" test). (A 100-101; 406 F. Supp. at 1235.) While the district court awarded appellees the declaratory and injunctive relief they sought, it refused to enter judgment for appellee Rabinovitch against the New York State Higher Education Services Corporation ("NYSHESC") covering the amount of scholarship and tuition assistance funds withheld from him during his first three years of college. (A 101-102; 406 F. Supp. at 1236.) Mr. Rabinovitch has appealed to this Court from that aspect of the judgment below (docket number 75-1809), but the Court has not yet acted on his jurisdictional statement.

The appellants' brief accurately sets forth the opinions below, the basis for this Court's jurisdiction and the undisputed facts of record. (Brief at 2-8.) Accordingly, we set out our view of the issues tendered by this appeal before turning to our argument.

Issues Presented

1. Whether the district court erred in recognizing appellee Rabinovitch's standing to challenge the constitutionality of NYEL § 661(3) insofar as it pertains to student loans.

2. Whether the district court erred in concluding that New York has failed to meet its burden under the Equal Protection Clause of demonstrating that the statutory exclusion of aliens from all forms of student financial aid satisfies a legitimate and substantial state interest and is precisely tailored to achieve that purpose.

3. Whether NYEL § 661(3) conflicts with the exclusive constitutional power of the federal government to regulate the conditions for the entrance and residence of aliens and imposes discriminatory burdens upon aliens in violation of 42 U.S.C. § 1981.[2]

Summary of Argument

1. A single statutory provision, NYEL § 661(3), disqualifies resident aliens unwilling to apply for United States citizenship from participation in all three of New York's programs of aid to students attending institutions of higher education. Appellee Rabinovitch has been denied assistance under both the academic performance and general award programs because of his status as an alien, and the appellants have conceded that if he were to apply for a student loan it would not be granted for the same reason. Indeed, appellee Rabinovitch meets all of the eligibility criteria for a student loan except citizenship.

Under these circumstances, even though he has not actually applied for a loan, appellee Rabinovitch has standing to challenge the constitutionality of NYEL § 661(3) as applied to the student loan program. The performance of pointless, formal acts is not required to acquire standing when there is already real and concrete adverseness resulting from actual injury suffered by application of the challenged statutory provision against the plaintiff. Additionally, as one clearly injured by operation of the statute, appellee Rabinovitch has *jus tertii* standing to challenge NYEL § 661(3) in the context not only of its infringement of his civil rights, but also as it affects the rights of others similarly situated.

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[2] While issue 3 was fully briefed and argued to the court below, the opinion does not discuss it because it disposed of the case on equal protection grounds. This legal contention nonetheless presents an independent ground for affirmance.

2. The citizenship requirement of NYEL § 661(3) deprives appellee Rabinovitch of his right under the Fourteenth Amendment to the equal protection of the laws. The state, having chosen to enact an eligibility requirement with the inherently suspect classification of alienage as the distinguishing characteristic, must satisfy the attendant strict judicial scrutiny test by showing that this classification is necessary to the accomplishment of a constitutionally permissible and substantial state interest.

Appellants have failed to meet this burden insofar as the "special public interest" doctrine, which formerly allowed the states to give preference to its citizens in the distribution of scarce economic resources, has been specifically rejected as a basis for upholding classifications based on alienage. While defining the state's political community is a substantial interest, the purpose of NYEL § 661(3) was not the definition of New York's political community. The legislative history of the financial aid programs demonstrates that the statutory purpose was not the enhancement of the size and education level of the electorate. Furthermore, the political community doctrine does not extend to ordinary legislative measures aimed at increasing voter registration and intelligence. Nor is the statute's purported purpose of expanding the electorate by "offering incentives to aliens to become naturalized" a legitimate state interest. Programs which withhold benefits from aliens in order to foster national citizenship are only justified if they serve a national interest, the advancement of which is not a legitimate state purpose.

Even if a statute serves a legitimate and substantial state interest, when a suspect classification is employed the state must also demonstrate that it is narrowly and precisely drawn to accomplish the implementation of that purpose. NYEL § 661(3) is not even rationally related to achieving the state's purported purpose because it does not require or guarantee that students receiving assistance

will remain in New York and participate in the political community.

3. NYEL § 661(3) conflicts with the exclusive constitutional power of the federal government to regulate the conditions for the entrance and residence of aliens, and imposes discriminatory burdens upon aliens in violation of 42 U.S.C. § 1981. A state can neither add to nor take from the conditions lawfully imposed on aliens by the federal government upon admission to and residence in the United States.

New York State has imposed an impermissible, auxiliary burden upon the entrance and residence of aliens within its borders by placing an often insurmountable burden in their path to full human development and economic security via higher education. Insofar as the state distinguishes between citizens and resident aliens (and between aliens) on the ground of the greater allegiance to the United States of the citizen, it acts in a manner inconsistent with federal law, as the Immigration and Nationality Act already makes suitable provision for excluding those persons of questionable allegiance to the United States. Moreover, in the area of federally guaranteed student loans, the New York citizenship restriction conflicts with a specific federal regulation.

ARGUMENT

I. Appellee Rabinovitch has the requisite standing to challenge the constitutionality of NYEL § 661(3) insofar as it pertains to student loans.

Though appellee Rabinovitch has actually been injured by the challenged statute in connection with two of New York's three programs of financial aid to students, namely, the academic performance and general awards programs, appellants continue to urge that he lacks standing to

challenge[3] NYEL § 661(3) insofar as it excludes aliens from receiving student loans. Noting that at oral argument "the state admitted that had Rabinovitch applied for a student loan, and refused to make the required statement of intention to become a United States citizen, his application would have been refused" (A 98; 406 F. Supp. at 1235), the court below concluded:

> "Nothing would be gained by adjudicating the statute as it applies to all but one aspect of the assistance program. Both plaintiffs allege injuries from this statute. Both would be further injured were they to apply for student loans. We feel that this is a proper case in which to apply the expanded concept of standing and allow these plaintiffs to assert the rights of those aliens who are injured by this statute with regard to loans. *Eisenstadt* v. *Baird,* 405 U.S. 438, 443-46 (1972); *Barrows* v. *Jackson,* 346 U.S. 249 (1953)." (A 99; 406 F. Supp. at 1235.)

The constitutional law of standing has never required a plaintiff to engage in pointless, fruitless acts as a prerequisite to the assertion of constitutional rights. *See, e.g., Hailes* v. *United States Air Lines,* 464 F.2d 1006, 1008 (5th Cir. 1972). *Cf. Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1975).[4] To require appellee to go through the formal motions of submitting an application for a student loan, with full knowledge of the cer-

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[3] Whether appellants mean that appellee's claim is constitutionally insufficient under the case or controversy limitation of Article III, or only that it is not yet ripe for review, is never made clear. (*See* Appellants' Brief at pp. 25-26.)

[4] Appellants' citation of *Mathews* v. *Diaz,* 426 U.S. 67 (1976) (Brief at 25), in support of their argument is erroneous. The district court in *Diaz* did not have jurisdiction over the claims of the class who "will be denied enrollment" because 42 U.S.C. § 405 (g), the relevant jurisdictional statute in that case, required a final decision by the Secretary of the Department of Health, Education and Welfare after a hearing as a prerequisite to jurisdiction. *See id.* at 71-72 n.3.

tainty of its denial on the grounds of his alienage, would be to require the performance of a meaningless act which would add absolutely nothing to the real and concrete adverseness of the extant controversy already before the Court.

We are here dealing with a single statutory proscription applicable to all aid programs. If the statute is unconstitutional as applied in the case of scholarships and tuition assistance, there is no possibility that it could survive a similar challenge as applied to student loans. It would, therefore, serve no purpose to require piecemeal litigation of the statute's constitutionality.

Furthermore, on the record before the Court it appears that appellee does in fact satisfy all of the requisite eligibility criteria for a student loan, other than citizenship. To qualify for a loan (without regard to interest benefits) a student must demonstrate only "a sense of responsibility toward repayment", bona fide New York residency, and enrollment or acceptance for admittance as a full time student at an approved college. *See* NYEL § 680.1.a; A 28-29. Appellee clearly satisfies all these criteria.

Appellants point to the possibility that appellee might fail to meet the "need or responsibility requirements" for a loan. (Appellants' Brief at 26.) First, there is no "need" requirement in order to qualify for a loan. The criteria of "need" only comes into play when an applicant also seeks interest benefits. *See* A 29; Appellants' Brief at 16-17; NYEL § 680.1.a, b. Second, predicating lack of standing on the ground that appellee may not have "a sincere sense of responsibility toward repayment" (A 28) is frivolous. It is quite clear that appellee's failure to state his intent to become a citizen would result in a denial of his loan request without any further examination into his "sense of responsibility."

Further, this Court has frequently held that one injured by operation of a statute has standing to challenge it in

the context not only of its infringement of his civil rights but also as it affects the rights of others similarly affected.[5] To the extent that such standing has been confined within certain limits by the Court, such

> "limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary 'rule of self restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig* v. *Boren, supra,* 45 U.S.L.W. at 4058.

It cannot be said that the "applicable constitutional questions are ill-defined and speculative" insofar as they relate to student loans; indeed, they are identical in both the scholarship and loan areas. As the Court recently observed:

> "In such circumstances, a decision . . . to forego consideration of the constitutional merits [of the citizenship requirement for student loans] in order to await the initiation of a new challenge to the statute by injured third parties [aliens whose applications for loans were actually rejected] would be impermissibly to foster repetitive and time consuming litigation under the guise of caution and prudence." *Id.*

Moreover, since the "applicable constitutional questions have been . . . presented vigorously and 'cogently,' . . . the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose" in this case. *Id.*

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[5] *See Craig* v. *Boren,* 45 U.S.L.W. 4057 (U.S. Dec. 20, 1976); *Roe* v. *Wade,* 410 U.S. 113 (1973); *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972); *Eisenstadt* v. *Baird,* 405 U.S. 438, 445 (1972); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Barrows* v. *Jackson,* 346 U.S. 249 (1943). *See also* Note, *Standing to Assert Constitutional Jus Tertii,* 88 Harv. L. Rev. 423 (1974).

II. NYEL § 661(3) is unconstitutional because it deprives appellee Rabinovitch of his right under the Fourteenth Amendment to the equal protection of the laws.

A. The Fourteenth Amendment protects citizens and aliens alike.

It is now well settled that the reference to "person" in the Fourteenth Amendment's Equal Protection Clause[6] includes aliens as well as citizens. *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971). As this Court has noted, "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 309 n.5 (1970), *quoting from*, *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). As such, appellee Rabinovitch is entitled to demand and receive equal treatment under the law. *See* 42 U.S.C. § 1981.[7] The question to be resolved, therefore, is whether NYEL § 661(3) offends that principle.

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[6] The Fourteenth Amendment provides, *inter alia*, that no state shall "deny to any person with its jurisdiction the equal protection of the laws."

[7] Indeed, the principle of equal protection for the alien dates back at least to the Mosaic Code as recorded in the Old Testament. There are at least two references to the subject in the Bible:

> "And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself: for ye were strangers in the land of Egypt. . . ." (Leviticus 19:33 and 34.)
>
> "Ye shall have one manner of law, as well for the stranger, as for the native." (Leviticus 24:22.)

B. A legislative classification based upon alienage must necessarily and precisely advance a legitimate and substantial state interest.

Just last term the Court reaffirmed the principle that "state classifications based on alienage are subject to 'strict judicial scrutiny.'" *Examining Board* v. *de Otero*, 96 S. Ct. 2264, 2281 (1976). That rule derives from the fact that classifications based on alienage as the distinguishing characteristic, like those based upon color, race or national origin "are inherently suspect. . . . Aliens as a class are a prime example of a 'discreet and insular' minority for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson, supra*, 403 U.S. at 372. *Accord, Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973). A state which incorporates a suspect classification into its laws "'bears a heavy burden of justification.' *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964)." *In re Griffiths*, 413 U.S. 717, 721 (1973).

Before the state may impose special burdens on aliens or withhold from them benefits otherwise generally available, it must demonstrate that

> "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths, supra*, 413 U.S. at 721-22.

See also Examining Board v. *de Otero, supra*, 96 S. Ct. at 2281. Though the state interest required to satisfy the strict scrutiny standard has been variously characterized as "overriding", *McLaughlin* v. *Florida, supra*, 379 U.S. at 196, "compelling", *Graham* v. *Richardson, supra*, 403 U.S. at 375, "important", *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972), or "substantial", *In re Griffiths, supra*, 413 U.S. at 721, the Court has indicated that "no particular significance" is to be attached to these differences in articulating the same test. *Id.* at 722 n.9. (*See* A 101 and Appellants'

Brief at 22.) What the Constitution demands is that

> "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Examining Board* v. *de Otero, supra*, 96 S. Ct. at 2282-83.

Appellants offer three reasons why the strict scrutiny standard should not be applied in this case. First, they contend that the statutory classification is not suspect because alienage is not the distinguishing characteristic. *See Friedler* v. *University of State of New York*, 70 Misc. 2d 416, 418, 333 N.Y.S.2d 928, 931 (Sup. Ct. Erie Co. 1972). Relying upon *Mathews* v. *Diaz, supra*, appellants argue that NYEL § 661(3) "distinguishes only within the 'heterogenous' class of aliens . . . and does not distinguish between citizens and aliens *vel non*." (Brief at 19-20.) Second, they argue that the purpose of the statutory classification is the preservation of the state's "political community."[8] (Brief at 20.) Third, appellants contend that the subject statute involves aid to higher education rather than the denial of welfare benefits ("the necessities of life") or the foreclosure of "public and private occupations". (Brief at 21.) We submit that none of appellants' arguments support the conclusion that NYEL § 661(3) is "excepted from strict scrutiny." (Brief at 20, 21.)

1. The appellants' first contention is premised on the assumption that it is not the fact of foreign citizenship

[8] Considered as a statement of fact reflective of governmental intent at the time of enactment, we do not agree that preservation or enhancement of its "political community" was what the legislative and executive branches of the New York State government intended when they enacted the citizenship restriction now codified as NYEL § 661(3). *See infra* at pp. 18-22. The "political community" rationale is simply an argument advanced in the face of litigation.

which is critical but the unwillingness to apply for American citizenship as soon as one is able. The classification is thereby made to hinge not on the affirmative factor of alienage, but on the negative lack of American citizenship or "affinity." (Appellants' Brief at 18.) This formulation is but the converse of the same discriminatory pattern which has been repeatedly denounced in the decisions of this Court, and it is sophistical in the extreme to rescramble the words and term the practice legitimate.

The fact that New York's statutory classification is between citizens and those resident aliens able and willing to become American citizens on the one hand, and resident aliens not so willing on the other, is not constitutionally significant. In *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410 (1948), the division was between citizens and resident aliens eligible for United States citizenship, and ineligible resident aliens. That statutory distinction closely resembles the current case, and *Takahashi* clearly holds that kind of statutory discrimination invidious. Thus, the fact that the classification found in NYEL § 661(3) is not exactly between alien and citizen cannot be used as a mitigating shield to justify the use of a less than stringent constitutional analysis. *See also Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (municipal ordinance discriminatorily enforced only against Chinese aliens); *Graham* v. *Richardson, supra* (Arizona statute distinguished between citizens and aliens with 15 years residency in the United States and all other aliens).[9]

This Court's decision in *Mathews* v. *Diaz, supra*, dealing as it did with the power of the federal government to regulate the right of classes of aliens to receive federal benefits, lends no support to appellants. As the Court pointed out in part IV of its unanimous opinion, "the Fourteenth Amendment's limits on state powers are sub-

[9] *See also Hosier* v. *Evans*, 314 F. Supp. 316 (D.V.I. 1970); *Williams* v. *Williams*, 328 F. Supp. 1380 (D.V.I. 1971); *Sailer* v. *Tonkin*, 356 F. Supp. 72 (D.V.I. 1973).

stantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." 426 U.S. at 86-87. Since "it is the business of the political branches of the Federal Government, rather than that of . . . the States . . . to regulate the conditions of entry and residence of aliens," *id.* at 84,

> "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas a comparable classification by the Federal Government is a routine and normally legitimate part of its business." *Id.* at 85.

See also Hampton v. *Mow Sun Wong*, 426 U.S. 88, 101, 116 (1976).

2. The fact that NYEL § 661(3) is allegedly designed to enhance and preserve the political community that is New York State does not exempt the statute from the strict scrutiny test.

> "The appropriate standard of judicial review is determined, not by the strength of the public interest sought to be protected, but rather by the nature of the right (fundamental or not) being regulated and/or the type of classification (suspect or not) which the regulation creates." *Norwick* v. *Nyquist*, 417 F. Supp. 913, 918 (S.D.N.Y. 1976) (three-judge court), *appeal docketed*, 45 U.S.L.W. 3437 (U.S. Dec. 21, 1976) (No. 76-808).

Since the statute here at issue incorporates a suspect classification, the appropriate standard of review is the strict scrutiny test.

While state statutes prescribing the qualifications for voters and "elective or important nonelective executive, legislative, and judicial" officers will not be subjected to the "demanding" degree of scrutiny otherwise employed in evaluating statutes which incorporate a suspect classification, *Sugarman* v. *Dougall*, *supra*, 413 U.S. at 647-48, the statute here at issue does not benefit from that rule because it does not speak directly to a person's "participation in [the state's] democratic political institutions." *Id.* at 648. Furthermore, even those state statutes which in fact are aimed at defining a state's political community are subject to strict scrutiny. What the Court has indicated is only that such statutes will be found to serve a "substantial purpose"; they are nonetheless to be strictly scrutinized (though with less than demanding exactitude) if they employ a suspect classification in order to determine whether the discriminatory means employed is "precisely drawn in light of the acknowledged purpose." *Id.* at 643.

3. Since it is the employment by the state of a suspect classification that calls forth the strict scrutiny standard, it makes no difference that in previous cases the burdens imposed or benefits denied were different from the educational aid payments here at stake. The test remains the same; the only area of possible difference relates to the substantiality of the state interest sought to be achieved.

Furthermore, even though access to public education has been held not to be a fundamental right guaranteed by the Constitution, *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), education is certainly "vital to existence."

> "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens."[10] *Dixon*

[10] The principle applies whether one is concerned with "good citizens" or with good members of the community be they citizens or resident aliens.

v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).[11]

As this Court has acknowledged: "Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

The educational assistance funds at issue in this case are often the key which opens the door to education. (See *infra* n.21 at p. 31.) Without assistance appellee Rabinovitch may not be able to continue his education[12] or pursue it in the institution of higher learning in New York which offers the best course of study in his field of specialization. (*See* A 70-71.) We can frankly see no constitutional difference between access to educational assistance and access to public assistance, the professions or a job. It can hardly be argued that the right to practice (*e.g.*, law or civil engineering) or hold a specific job (*e.g.*, a civil service position) is any more "vital" than the right to receive scholarship assistance. Since those state enactments were required to meet the strict scrutiny test, so too should NYEL § 661(3).

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[11] At issue in *Dixon* was "the right to remain at a public institution of higher learning . . ." 294 F.2d at 157.

[12] When the case began, Brooklyn College, which appellee attends, was a tuition free institution within the City University of New York City. However, due to New York City's financial crisis, substantial tuition charges have now been imposed. Thus appellee must now pay $925 per year in tuition (*see infra* n. 21 at p. 31), a serious burden considering that the total adjusted gross income before taxes of appellee's family of four is only about $13,000. (A 76.)

C. NYEL § 661(3) does not promote a legitimate and substantial state interest and is not narrowly and precisely drawn to promote the achievement of its purported purpose.

1. The state interest served is not substantial.

Does New York's exclusion of lawfully admitted resident aliens who meet its durational residency requirement (NYEL § 661(5)) from all forms of assistance for higher education serve a legitimate and substantial state interest? That question was specifically addressed by the court below which unanimously concluded that appellants "failed to meet this burden. . . . [T]he State has not demonstrated a compelling interest justifying its discriminatory classification." (A 100, 101; 406 F. Supp. at 1236.) We submit that that holding is clearly correct and should be affirmed.

Neither reason appellants have advanced (Brief at 22-24) supports the constitutionality of NYEL § 661(3).

a. The "special public interest" doctrine is dead.

The "special public interest" doctrine, which held that a state government was justified in giving preference to citizens in the distribution of scarce economic resources—*see Crane* v. *New York*, 239 U.S. 195 (1915)—has been specifically rejected as a basis for upholding classifications based on alienage. *Graham* v. *Richardson, supra*, 403 U.S. at 375. There "can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State." *Id.* at 376. *Accord, Sugarman* v. *Dougall, supra*, 413 U.S. at 644-45; *C.D.R. Enterprises, Ltd.* v. *Board of Education*, 412 F. Supp. 1164, 1169-70 (E.D.N.Y. 1976) (three-judge court), *aff'd*, 45 U.S.L.W. 3462 (U.S. Jan. 11, 1977) (the right-privilege and special public interest doctrines "are not simply moribund; we believe they are dead.")

b. The statute does not come within the "political community" doctrine.

The appellants argue that NYEL § 661(3) is aimed at "preserving and strengthening . . . [New York's] political community." (Brief at 17.) They contend that the statute is intended to enhance the "numerical strength of the electorate and its educational level." (Brief at 20-21; *see also id.* at 22-23.) We do not agree that the intended purpose of NYEL § 661(3) and its predecessors was to preserve and strengthen the New York political community. In addition, the political community doctrine recognized by this Court does not encompass legislation designed to increase the number and educational level of a state's electorate.

(i) Neither NYEL § 661(3) nor the state's overall program of financial aid are in fact aimed at enhancing the state's political community.

1. While the appellants' recitation of the historical antecedents of NYEL § 661(3) is accurate as to the particulars of previous statutory and administrative enactments, it does not accurately convey the governmental intent of the legislative and executive branches as to the purpose of the citizenship requirement. Though there has been some statutory or administrative provision requiring discrimination against aliens since 1920, no statement of governmental intent has ever been issued articulating the reason for and purpose served by the proscription. Not once in the 57 years since its original enactment in 1920 has the state ever explained the goals sought to be achieved by the restriction. Appellants have pointed to no such specific statement of policy (*see* Brief at 9-17) and our independent research has failed to reveal any.[13]

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[13] The present statutory provision dates from the 1969 revision of the Education Law. L. 1969, c. 1154. There is no legislative history explaining why or for what reason that provision was in-

(footnote continued on following page)

2. If we look to the general purposes sought to be advanced by New York's program of financial assistance for students of institutions of higher education, we find that enhancement of the state's political community is not mentioned and that the exclusion of aliens as required by NYEL § 661(3) runs counter to the general purposes of the program. The predecessor of NYSHESC was established in 1957. L. 1957, c. 367. The purpose of the corporation was "to improve the higher educational opportunities of persons who are residents of this State, and who are attending or plan to attend colleges in this State or elsewhere, by lending funds to such persons to assist them in meeting their expenses of higher education." L. 1957, c. 367, § 1. Enacted as part of the 1957 program for higher education, the objective of the legislation was "'to make sure that *no qualified young person in the State* is denied education beyond high school because of lack of facilities or because of inability to pay for it.'" Joint statement by O. D. Heck, Speaker of the Assembly, and W. J. Mahoney, Senate Majority Leader, 1957 New York State Legislative Annual 155; emphasis supplied.[14]

(footnote continued from preceding page)

cluded. Indeed, there is no reference at all to adding such a limitation in any of the study reports or legislative memoranda on higher education issued at or about the same time. ***See Freedom to Pursue a College Education,*** Recommendations by the State Board of Regents for Modifying and Extending New York State's Student Financial Aid Program (University of State of New York, State Education Department, Albany, 1967); ***New York State and Private Higher Education,*** Report of the Select Committee on the Future of Private and Independent Higher Education in New York State (1968); ***Report of the Joint Legislative Committee to Revise and Simplify The Education Law,*** Legislative Document (1968) No. 84; ***Memorandum of Joint Legislative Committee to Revise and Simplify the Education Law,*** 1969 New York State Legislative Annual 214-15; ***Report of the Joint Legislative Committee on Higher Education,*** Legislative Document (1970) No. 26.

[14] *See also* the 1956 memorandum of appellant Nyquist commenting on L. 1956, c. 798, establishing engineering scholarships, wherein he wrote: "This State is committed to the policy of ex-

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The student aid program was expanded in 1961. L. 1961, c. 392. That legislation was characterized by the governor as representing "a major breakthrough in New York's efforts to assure an opportunity for higher education to *every young man and woman in the State* who has the ability and desire to achieve it." Memorandum of Governor Rockefeller, McKinney's 1961 Session Laws of New York at 2103; emphasis supplied. *See also id.* at 2105. The major change effected by the 1961 legislation was creation of non-competitive tuition assistance awards (then termed "scholar incentive" awards). The memorandum of the State Education Department in support of the scholar incentive plan noted that "[i]f this bill becomes law, any student who has the ability and the incentive to undertake college education is provided with initial funds to enable him to embark upon such a career. . . . Hence, the State has embarked upon this program which grants *opportunities to every child.*" McKinney's 1961 Session Laws of New York at 1963; emphasis supplied.

The legislative purposes as spelled out in 1961 did not include enhancing the political community by increasing the number and education level of voters. Rather, the legislature sought to make higher education available to "all who have the desire and the capacity." L. 1961, c. 389, § 1(a). The overriding purpose of the program was "to develop fully" a "reservoir of talent and future leadership." L. 1961, c. 389, § 1(c). *See also* L. 1961, c. 389, § 1(e).[15]

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tending educational opportunity to all within the State who desire and can profit from it, irrespective of their social status, race, color, creed or religion." 1956 New York State Legislative Annual 146.

[15] The only use of the word "citizen" in the entire legislative history of New York's financial aid programs occurs in one sentence in Section 1(a) of the legislature's 1961 declaration of purposes: "The future progress of the state and nation and the general welfare of the people depend upon the individual development of the

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When the program of financial assistance was revised in 1969 this general purpose continued to serve as the guiding principle. Governor Rockefeller, in signing the bill, L. 1969, c. 1154, noted that it would do much "to further New York State's goal that no young man or woman with the capacity and the desire to seek a college education should be prevented from doing so for lack of financial resources." 2 McKinney's 1969 Session Laws of New York at 2588. *See also* Memorandum of Governor Wilson pertaining to the 1974 revision of Articles 13 and 14 of the Education Law, L. 1974, c. 942, 2 McKinney's 1974 Session Laws of New York at 2117.

3. The history of the citizenship restriction itself runs counter to the presently articulated purposes for NYEL § 661(3). While initially imposed in 1920, L. 1920, c. 502, § 1, the class of persons eligible for scholarships was expanded in 1957 to include "minors and natural children of parents, at least one of whom is a citizen." L. 1957, c. 756, § 4. In 1959 it was again expanded to include minors and natural children of parents "at least one of whom has duly declared intention of becoming . . . [a] citizen in accordance with law." L. 1959, c. 479, § 1. Thus, even resident aliens unwilling to become citizens were eligible for scholarships from 1957 until 1962 when adoption of the Regents' Rule, 8 N.Y.C.R.R. § 145.4 (1962), limited scholarship to citizens and aliens willing to become citizens.

When the tuition assistance (or scholar incentive) program first came into being in 1961, there was no statutory

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maximum number of citizens to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations." L. 1961, c. 389, § 1(a). Read in context, it is hard to understand why appellants rely upon it (*see* Appellants' Brief at 12, 20-21, 23) as evidencing the fact that the purpose of the state's aid programs was simply the development of more and better voters.

citizenship requirement and, as appellants concede (Brief at 15), the Regents' Rule concerning citizenship did not cover scholar incentive awards—which awards have always constituted the bulk of the funds available under the overall aid program. (*See* Appellants' Brief at 8.) Thus, between 1961 and 1969, resident aliens were provided with scholar incentive awards even though they had no intention of joining or participating in the political community.

4. Based on the foregoing analysis, certain conclusions emerge: First, there has never been a legislative or executive declaration explaining the purpose of NYEL § 661(3) or its predecessors. Second, the general purpose served by the state's overall aid program is to provide assistance to all with the requisite desire and capacity in order to secure the broad benefits that result from an educated populace. Third, the exclusion of aliens has not been a consistent policy; aliens have previously been the recipients of both scholarships and tuition assistance. Our ultimate conclusion is that NYEL § 661(3) serves no purpose save to discriminate against aliens simply because of their status as citizens of another country[16]—a purpose not permitted under the Fourteenth Amendment. *See In re Griffiths, supra,* 413 U.S. at 722 n.8.

(ii) The political community doctrine recognized by this Court does not encompass legislation designed to increase the number and educational level of a state's electorate.

The power to define its political community, recognized as a substantial state interest in *Sugarman* v. *Dougall, supra,* 413 U.S. at 643, does not encompass the enhancement of the number and educational level of a state's electorate.

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[16] *See* Memorandum of the State Department of Education, 1964 New York State Legislative Annual 209-10.

The political community doctrine is intended to recognize the substantial nature of the state's interest "in establishing its own form of government and in limiting participation in that government to those who are within 'the basic conception of a political community.' *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972)." *Id.* at 642. Thus this Court has indicated that when a state acts to establish the qualifications for voters, elected officials, important non-elected officials "who participate directly in the formulation, execution or review of broad public policy," it is defining its political community and acting to carry out a substantial state interest. *Id.* at 647-49. *See also In re Griffiths, supra,* 413 U.S. at 729; *Foley* v. *Connelie,* 419 F. Supp. 889, 901 (S.D.N.Y. 1976) (Mansfield, J., dissenting) (three-judge court), *appeal docketed,* 45 U.S.L.W. 3449 (U.S. Jan. 4, 1977) (No. 76-839).[17] The doctrine has never been extended to include measures designed to encourage voter registration and education. Such measures do not involve the state's "constitutional prerogatives" to establish its own form of government and political institutions. *Sugarman* v. *Dougall, supra,* 413 U.S. at 642, 648.

To equate the state interest here asserted with the political community concept as previously defined by the Court would be to recast the doctrine so that virtually any state statute which could even arguably be said to "encourage" voter registration or education would have to be regarded as furthering a substantial state interest. The exception would then engulf the rule. Indeed, New York's uniform response to the recent spate of litigation challenging its

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[17] While the political community concept has recently been construed to include the establishment of the qualifications for state jurors, *Perkins* v. *Smith,* 370 F. Supp. 134 (D. Md. 1974) (three-judge court), *aff'd* 96 S. Ct. 2616 (1976), it does not include the establishment of the qualifications of attorneys, *In re Griffiths, supra,* or notaries public. *Taggart* v. *Mandel,* 391 F. Supp. 732 (D. Md. 1975).

various statutory exclusions of aliens has been to assert the political community purpose in support of virtually all such legislative classifications.[18] We submit that appellants have offered no reason whatever for thus expanding a salutory principle of federal-state comity under the Fourteenth Amendment to include even routine state measures.

2. The state interest served is not legitimate.

When appellants speak of the state attempting "to expand its electorate by offering incentives to aliens to become naturalized" (Brief at 22), they are, of necessity, admitting that the state is seeking to compel aliens to become United States citizens. This Court has, however, held that programs which withhold benefits from aliens in order to foster national citizenship are only justified if they serve a national interest, and the national interest can only be articulated by the President and the Congress. The advancement of such a national interest is not a legitimate state function. *See Hampton* v. *Mow Sun Wong, supra,* 426 U.S. at 95-96, 101; *Mathews* v. *Diaz, supra,* 426 U.S. at 85.

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[18] *See Surmeli* v. *New York,* 412 F. Supp. 394 (S.D.N.Y. 1976) (practice of medicine limited to citizens and resident aliens who become citizens within ten years of licensure); *Norwick* v. *Nyquist, supra* (aliens precluded from teaching in New York public schools); *Foley* v. *Connelie, supra* (upholding by a 2-1 vote the constitutionality of a New York statute excluding aliens from employment as New York State police officers; Circuit Judge Mansfield filed a strong dissent); *Kulkarni* v. *Nyquist,* —— F. Supp. —— (76-CV-344 and 76-CV-360; January 5, 1977) (N.D.N.Y.) (practice of both civil engineering and physical therapy limited to citizens). The only recent case in which the argument was apparently not made was *C.D.R. Enterprises, Ltd.* v. *Board of Education, supra.*

This ubiquitous use of the political community rationale further undermines the appellants' argument that enhancement of New York's political community is the intended statutory purpose of NYEL § 661(3).

In *Hampton* the Civil Service Commission advanced several interests which it asserted were sufficient to justify the exclusion of non-citizens from the federal civil service. It was argued that "reserving the federal service for citizens provides an appropriate incentive to qualify for naturalization and thereby to participate more effectively in our society." 426 U.S. at 104. The Court assumed without deciding that if Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized. *Id.* at 105. However, the Court noted that that interest was not a matter which is properly the business of the Civil Service Commission. *Id.* at 116. Additionally, the court noted that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." *Id.* at 100. Accordingly, we submit that fostering national citizenship is not a legitimate state concern. *Cf. Jones* v. *Wade,* 479 F.2d 1176, 1179 n.1 (5th Cir. 1973) (interest in requiring proper respect for the United States flag is to a large extent properly a federal interest; state interest, if any, is subject to strict limitation).

3. The statute is not narrowly and precisely drawn to accomplish its articulated goals.

We submit, as the court below concluded, that NYEL § 661(3) is not narrowly and precisely drawn to accomplish its articulated goals. Indeed, we do not believe that this statute can even survive under the rational relationship standard.

First, though the state claims it is seeking to enhance the size and education level of its electorate, NYEL § 661(3) does not require aid recipients to register and vote in state elections. Moreover, pursuant to Section 168 of the New York Election Law, the education level

necessary for voting in New York elections is only the completion of the sixth grade.[19]

Second, there is no requirement in New York's financial aid programs that any student who receives assistance must remain in New York and participate in any way in the "political community." Appellee and his family have lived in New York for thirteen years and have contributed directly and indirectly to the well-being of the community in which they reside. Nonetheless, appellee has been excluded from receiving any form of educational assistance. On the other hand, an American citizen who may have lived elsewhere all of his life and who, therefore, together with his family, has contributed much less to the well-being of the community, is entitled to the full panoply of assistance after only approximately nine months residence in the state. NYEL § 661(5). Indeed, while appellee presently intends to continue to reside in New York after graduation (A 69), the citizen may, and is in fact free to, leave New York after the receipt of thousands of dollars of educational assistance. The appellee will continue to contribute to the well-being of the state and will use within the state the knowledge and skills acquired in college; the citizen may well leave New York after graduation and take with him the benefits derived from the funds received and never make any contribution to the community.

Third, New York in fact does not even limit its aid to those who pursue their studies in the state. Assistance under the student loan program is given to New York residents for study in institutions of higher learning located in New York "or elsewhere." NYEL § 680.1.a.

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[19] Indeed, pursuant to Section 4(e) of the federal Voting Rights Act, 42 U.S.C. § 1973b(e), the sixth grade standard may even be satisfied via completion of studies in Spanish in public or private schools accredited by the Commonwealth of Puerto Rico. *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

Fourth, by including the paroled refugee category within the class of eligible recipients, New York may well have acted humanely, but it has undermined its stated purpose. There is no way that New York can act to change the status of such refugees and make them eligible for citizenship—only the federal government can bring about that result. By including this group within the covered class, New York accords non-citizens who cannot presently even qualify for citizenship and participation in the political community a benefit which long time resident alien taxpayers, such as appellee, are precluded from receiving.

The foregoing result is simply not constitutionally permissible under any Fourteenth Amendment standard. Citizenship does not "in anyway causally relat[e] to or guarante[e] political involvement." *Kulkarni* v. *Nyquist, supra,* slip opinion at 5. Indeed it is not even a "guarantee" that a person will continue to reside in any state "or even in the United States." *Examining Board* v. *de Otero, supra,* 96 S. Ct. at 2283. As such,

> "there is little, if any, basis for [a state] treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare [or educational aid] programs are concerned." *Mathews* v. *Diaz, supra,* 426 U.S. at 85.

Two lower courts have already considered classifications similar to the one here at issue and in both cases the statutes were struck down as unconstitutional. *Chapman* v. *Gerard,* 456 F.2d 577 (3d Cir. 1972) (aliens barred from participation in Virgin Islands territorial scholarship fund); and *Jagnandan* v. *Giles,* 379 F. Supp. 1178 (N.D. Miss. 1974) (three-judge court), *aff'd as to damages,* 538 F.2d 1166 (5th Cir. 1976) *pet. for cert. filed,* 45 U.S.L.W.

3449 (U.S. Jan. 4, 1977) (state statute classifying aliens as non-residents for the purpose of charging higher tuition and fees to attend state supported institutions of higher education).

We submit the NYEL § 661(3) is clearly not structured to precisely achieve its supposed purpose. Because a classification subject to strict judicial scrutiny fails to satisfy that test if it is "insufficiently 'tailored' to achieve the articulated state goal," *Dunn* v. *Blumstein, supra,* 405 U.S. at 357, the court below correctly determined that NYEL § 661(3) is unconstitutional. Recalling this Court's admonition of more than twenty years ago that "[s]uch an opportunity [public education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms," *Brown* v. *Board of Education, supra,* 347 U.S. at 493, we urge affirmance of the holding below.

III. NYEL § 661(3) conflicts with the exclusive constitutional power of the federal government to regulate the conditions for the entrance and residence of aliens and imposes discriminatory burdens upon aliens in violation of 42 U.S.C. § 1981.

The power to regulate the immigration and naturalization of aliens is exclusively a federal power committed to the political branches of the federal government. *DeCanas* v. *Bica,* 424 U.S. 351, 354 (1976); *Examining Board* v. *de Otero, supra,* 96 S. Ct. at 2281; *Mathews* v. *Diaz, supra,* 424 U.S. at 81; U.S. Const. Art. I, § 8, cl. 4. A state statute which conflicts with the federal program for the regulation of resident aliens may not stand because it constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Hines v. *Davidowitz,* 312 U.S. 52, 67 (1941); *DeCanas* v. *Bica, supra,* 424 U.S. at 363.

The States

> "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration. . . ." *Takahashi* v. *Fish & Game Comm'n, supra,* 334 U.S. at 419.

Accord, DeCanas v. *Bica, supra,* 424 U.S. at 358 n.6. Accordingly, a state statute which imposes "auxiliary burdens upon the entrance or residence of aliens . . . discourages entry into or continued residency in the State." *Graham* v. *Richardson, supra,* 403 U.S. at 378-79, and conflicts with the supreme federal power in the immigration area.

Congress has in fact enacted a comprehensive plan for the regulation of aliens residing in the United States, and has broadly guaranteed aliens "the same right in every State and Territory . . . to the full and equal benefit of all laws . . . for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981. As a consequence of this statutory declaration "[a]liens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminatory laws.'" *Graham* v. *Richardson, supra,* 403 U.S. at 377, *quoting from Takahashi* v. *Fish & Game Comm'n, supra,* 334 U.S. at 420.

On the basis of this congressionally declared policy of equality of legal privilege, the Court has struck down state statutes which discriminated against aliens in the enjoyment of public resources, the receipt of public bene-

fits and in the opportunity to work. *See* ***Takahashi*** v. ***Fish & Game Comm'n, supra; Graham*** v. ***Richardson,*** *supra; C.D.R. Enterprises* v. ***Board of Education, supra.***[20]

The same conclusion should obtain here. Education is vital and necessary in order to secure a job and advance economically. *See* discussion *supra* at pp. 15-16 and *infra* at pp. 31-32. The right to engage in a chosen profession, guaranteed the alien by the Court's decisions in *In re Griffiths, supra,* and *Examining Board* v. *de Otero, supra,* is meaningless if the alien is unable to obtain the necessary training. The fact that education has not been held to be a "fundamental right" is not determinative because a state can violate federal policy by simply denying aliens a "privilege" offered to its citizen residents. *Graham* v. *Richardson, supra.*

Nor is it sufficient to state that the permanent resident alien is not completely barred from attending New York's institutions of higher education. (Appellants' Brief at 21.) Complete foreclosure of an area is not necessary before a determination can be made that a state law "burdens" an alien's residence in this country. In *Truax* v. *Raich,* 239 U.S. 33 (1917), the Court struck down as violative of federal immigration policy an Arizona law which required all Arizona employers of more than five workers to hire at least 80% qualified electors or native-born citizens of the United States. Of course, the state had not foreclosed *all* employment to aliens. Up to 20% of the work force of these employers could constitute aliens, and presumably aliens were free to work without any numerical limitations in jobs requiring five or less employees.

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[20] *See also, Mohamed* v. *Parks,* 352 F. Supp. 518, 521 (D. Mass. 1973); *Sugarman* v. *Dougall,* 339 F. Supp. 906, 910-11 (S.D.N.Y. 1971) (three-judge court), *aff'd on other grounds,* 413 U.S. 634 (1973); *Younus* v. *Shabat,* 336 F. Supp. 1137, 1140 (N.D. Ill. 1971); *Purdy & Fitzpatrick* v. *California,* 71 Cal.2d 556, 79 Cal. Rptr. 77, 456 P.2d 645 (1969).

The consequences of being deprived the opportunity of pursuing higher education are real and burdensome. It is beyond peradventure that lack of financial assistance may effectively preclude attendance in college. This is so even in the absence of a tuition charge.[21]

Indeed, the entire enactment of New York's financial aid program is the result of the recognition that a lack of funds can effectively bar an otherwise qualified student from attending college. (*See* discussion *supra* at pp. 19-21.) The less education and training a worker receives, "the less chance he has for a steady job." *Occupational Outlook Handbook,* U.S. Dept. of Labor, p. 19 (1976-77). The unemployment rate of persons who have completed only four years of high school is double that of college graduates. *Id.* Additionally, "[a]ccording to the most recent data, men who had college degrees could expect to earn about . . . two and three-quarters times the [amount] likely to be earned by workers who had less than 8 years of schooling, nearly twice the amount earned by workers

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[21] The question is largely academic for our purposes because there is no longer any opportunity to receive a "tuition-free" college education in New York State. The "free tuition" policy of the City University of New York (CUNY) ended in the summer of 1976. The tuition rate for full time students at Brooklyn College is $775 per year for freshmen and sophomores and $925 per year for juniors and seniors. Part time students pay $35 and $40 per credit in their respective categories. *Brooklyn College Bulletin* (1976-77).

The standard tuition fee for state residents attending college in the State University of New York system (SUNY) is $750 per year for freshmen and sophomores and $900 per year for juniors and seniors. Out-of-state residents pay $1200 and $1500 per year in the respective categories. *Undergraduate Bulletin,* State University at Albany Catalogue, p. 15 (1976-77).

The drop in full-time enrollment in both the senior and community colleges of CUNY after the imposition of tuition was eleven per cent, approximately 14,000 students. The drop in part-time enrollment was thirty per cent, approximately 27,000 students. DATA BOOK, City University of New York, Table III (1976-77) (forthcoming).

who had 1 to 3 years of high school and more than 1½ times as much as high school graduates." *Id.*

The effect of NYEL § 661(3) is to impose an obstacle in the path of the permanent resident alien seeking higher education and economic security. It constitutes a burden in an important and vital area crucial to his development and survival as a person. As such, it must be regarded as tending to discourage entrance and residence in New York State and conflicting with the federal grant of resident alien status to appellee. It also contravenes the federal policy expressed in 42 U.S.C. § 1981 of "equality of privileges" under state laws for all resident aliens.

New York's asserted concern for the resident alien's lack of allegiance and its contention that it may disfavor those residents of the state who have "chosen to retain [their] primary allegiance to the country of [their] nationality" (Brief at 19), clearly demonstrates the extent to which NYEL § 661(3) intrudes into forbidden territory. When a state enacts laws which distinguish between citizens and resident aliens unwilling to become citizens on the ground of the greater allegiance to the United States of the former group, it acts in a manner clearly inconsistent with federal law regulating the entrance and residence of aliens. *See Younus* v. *Shabat, supra.*

The Immigration and Nationality Act already makes suitable provision for excluding those persons of questionable allegiance to the United States. The provisions of 8 U.S.C. §§ 1182(a)(27), (28), (29), coupled with the questioning of entrants into this country by federal authorities,[22]

[22] All aliens arriving at ports of the United States are examined by immigration officers. The Attorney General and any immigration officer has the power to question entrants to the United States and

> "Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United

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indicate that the federal government considers the intent of an alien to become a citizen, as well as his allegience, in allowing him entry. The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. . . ." 8 U.S.C. § 1101(20). *Compare* 8 U.S.C. § 1101(15)(F).

If the federal government has allowed certain aliens admittance to this country as permanent resident aliens, without requiring them to declare their intention to become citizens as a condition of admission, then there is a clear federal policy that such aliens may live in each state on an equality of privilege with other state citizens without having to renounce their allegience to a foreign government or declare their intent to become citizens. A state statute which in effect conditions benefits on factors the federal government has already considered in allowing these aliens entrance into the country is a "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country" and impermissibly imposes "additional burdens not contemplated by Congress." *DeCanas* v. *Bica, supra,* 424 U.S. at 358 n.6.

The conclusion that the statute intrudes into the area of federal immigation policy is further buttressed by that part of the statute which makes eligible for assistance those aliens who are within "a class of refugees paroled by the attorney general of the United States under his parole authority. . . ."[23] NYEL § 661(3)(d).

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> States, whether or not he intends to remain in the United States permanently and, if an alien, *whether or not he intends to become a citizen.* . . ." 8 U.S.C. § 1225(a) (emphasis supplied).

[23] The Attorney General exercises his parole power pursuant to 8 U.S.C. § 1182(d)(5). The award or refusal of parole, its condi-

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In recent years he has exercised such authority on behalf of refugees who were "Czechoslovakians, Ugandans, Cubans temporarily sojourning in Spain and other countries, Vietnamese and Cambodians, and Jews from the Soviet Union." Gordon & Rosenfeld, 1 IMMIGRATION LAW AND PROCEDURE § 2.54 at 147 (1976 Supp.) Indeed, the legislative materials included in the official Bill Jacket to L. 1975, c. 663 maintained by the New York State Library in Albany indicate that NYEL § 661 (3)(d) was added in response to the plight of Soviet Jews paroled into the United States and residing in New York. *See* Letter of State Senator Carol Bellamy to Governor Carey, July 29, 1975.[24]

When New York amended NYEL § 661(3) in 1975 so as to grant paroled refugees the same benefits available to citizens, it was acknowledging that its previous exclusion of these persons was in clear conflict with the federal policy of admitting substantial numbers of such persons into the United States. If the state did not discriminate against aliens generally, the conflict with federal policy would not have existed and the 1975 amendment to the statute would not have been required to eliminate the burden that NYEL § 661(3) imposed on substantial numbers of Soviet Jewish refugees residing in New York.

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tions and its termination are in his discretion. Parole does not grant any legal residence status. "[I]t allows temporary harborage in this country for humane consideration or for reasons rooted in public interest." Gorden & Rosenfeld, 1 IMMIGRATION LAW & PROCEDURE § 2.54 at pp. 2-248-249 (1976).

[24] The Immigration and Naturalization Service was unable to provide counsel with any total figure on the number of parole refugees admitted under the Attorney General's discretion. We were informed, however, that between 1973-1976, 144,000 Indochinese, 2,550 Soviet Jews and 1,500 Ugandans were admitted under this power. On January 13, 1977, former Attorney General Levi announced that he had approved the parole into the United States of 4,000 more Soviet Jews currently residing in Rome. U.S. Dep't of Justice press release dated 1/13/77.

It is for the political branches of the federal government to classify aliens and decide the ramifications of such classification. "[D]ecisions in these matters may implicate our relations with foreign powers and a wide variety of classifications must be defined in the light of changing political and economic circumstances." *Mathews* v. *Diaz, supra,* 426 U.S. at 81. If every state were left free to decide which class of aliens it should benefit or burden, the interference with the comprehensive scheme of regulation enacted by Congress and our relations with foreign governments would be substantial.[25]

Finally, we submit that in the area of student loans assisted or funded by the feredal government, the New York citizenship restriction conflicts with a specific federal regulation. As a participant in the Federal Guaranteed Student Loan Program (*see* 20 U.S.C. §§ 1071-1087-2), New York must conform its student loan programs to federal standards. Those standards qualify for assistance all students, whether citizens or others "in the United States for other than a temporary purpose . . . [who] inten[d] to become a permanent resident thereof. . . ." 45 C.F.R. § 177.2(a) (1976). In this regard also New York is acting contrary to federal policy and is burdening those whom the federal government in the exercise of its exclusive authority over the status of aliens has mandated should receive equal treatment.

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[25] One can easily imagine that various Middle Eastern governments might be perturbed by New York State's policy of favoring Jewish refugees over resident aliens of other countries.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed insofar as it declared NYEL § 661(3) unconstitutional.

January 28, 1977

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* The assistance of Jay R. Fialkoff and Karen E. Wagner, two recent law school graduates awaiting admission to the New York Bar, in the preparation of this brief is hereby acknowledged.